

STATE OF NORTH DAKOTA
COMMISSIONER OF AGRICULTURE

IN THE MATTER OF:)	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
)	
Robert C. Herzog)	
)	
Respondent.)	
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On January 9, 2003, a Complaint was filed with the Commissioner of Agriculture by Douglas A. Bahr, Solicitor General, Office of Attorney General, attorney for the Department of Agriculture ("Department"), requesting imposition of a civil penalty against Robert C. Herzog, Respondent (hereinafter "Herzog"). The Complaint cites as grounds for the administrative action violations of N.D.C.C. § 4-35-15(7), (16) and N.D. Admin. Code § 60-03-01-07(2).

On March 21, 2003, the Commissioner of Agriculture requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On March 24, 2003, the undersigned ALJ was designated.

On April 17, 2003, the ALJ issued an Order on Motion and Denial of Request for Change of Venue based on the Department's March 21, 2003, Motion for Ruling on Jurisdiction, which was in response to the March 14, 2003, Answer of Robert C. Herzog asserting that the Commissioner lacked jurisdiction and that the Department's Complaint failed to state a cause of action against Herzog, and requesting a change in venue for the hearing.

On April 4, 2003, the ALJ issued a Notice of Hearing. The hearing was held as scheduled on June 9, 2003, in the Office of Administrative Hearings, Bismarck, North Dakota. The Department was represented by Mr. Bahr. The Department called four witnesses, including

Herzog, who was present at the hearing. Herzog was represented at the hearing by Mr. Brad A. Sinclair, Fargo. Herzog called two witnesses and testified in his own behalf. The Department offered exhibits 1-21, all of which were admitted, except exhibit 3, which was withdrawn. Herzog offered exhibits A-O, all of which were admitted except exhibits N and O, which were submitted under an offer of proof.

The Department filed its Post Hearing Brief on June 25, 2003. Herzog filed the Post Hearing Brief of Robert C. Herzog on July 31, 2003. The Department filed its Reply Brief on August 11, 2003.

The ALJ believes that he has ruled on all motions and requests made during the course of this proceeding, but if he has not, they are deemed denied.

Based on the evidence admitted at the hearing and the briefs of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. Herzog is a resident of Minnesota who operates as a commercial applicator of pesticides out of the business Ulen Aviation, Inc. ("Ulen"), a Minnesota Subchapter S Corporation involved in the commercial business of aerial spraying and dusting, *i.e.*, the application of agricultural pesticides and chemicals.

2. In July 1997, the North Dakota Secretary of State issued a Certificate of Authority to Ulen to operate as a foreign corporation in North Dakota. Ulen has annually filed its Foreign Corporation Annual Reports and continues to be in good standing with the North Dakota Secretary of State.

3. Herzog is currently certified as a commercial applicator of pesticides in North Dakota. However, as of July 3, 2002, Herzog had not complied with the certification

requirements of N.D.C.C. ch. 4-35 and was not a certified commercial applicator of pesticides in North Dakota. Since he was first informed by a Department employee that he was not a licensed certified commercial applicator of pesticides in North Dakota, on or about July 13, 2003, Herzog has complied with the requirements necessary to become certified.

4. The evidence shows, by the greater weight of the evidence, that on July 3, 2002, Herzog commercially, aerially applied a pesticide in Cass County North Dakota and was not at that time certified as a commercial applicator of pesticides in North Dakota.

5. The evidence shows, by the greater weight of the evidence, that on July 3, 2002, Herzog made a pesticide application for which he refused or neglected to keep and maintain records as required by law, and that he did not complete and make available the records of that July 3, 2003, application on the date the pesticide was applied. There were a number of deficiencies indicated by the records. The Department offered at the hearing the records it obtained during the course of its investigation as exhibits 8-11. Those records show deficiencies including the deficiency noted in the complaint that the pesticide application was made in the morning but was recorded as being made in the evening. For the first time, at the hearing, the Respondent offered exhibit L at the hearing, claiming that these were, in fact, Herzog's records of the July 3, 2002, application in question, but these records, too, show deficiencies. These records do not identify the pests or pest controlled, the person who supplied the pesticide, or a description of the equipment used in the application. More importantly, the evidence shows, these records offered by Herzog were not completed and made available for inspection on the day the pesticide was applied.¹

¹ The evidence shows that the records the Department obtained were the records of West Central Ag Services for the application by Herzog on July 3, 2002. Herzog testified that exhibit L were the records actually maintained by him.

CONCLUSIONS OF LAW

1. This administrative action is taken under N.D.C.C. chs. 4-35 and 28-32. The Commissioner is authorized to bring this action under N.D.C.C. §§ 4-35-23 and 4-35-24.
2. On July 3, 2002, Herzog was a resident of the State of Minnesota, operating as a commercial applicator of pesticides out of Ulen.
3. On July 3, 2002, Herzog commercially, aurally applied a pesticide in North Dakota without first being certified as a commercial applicator of pesticides in North Dakota, in violation of N.D.C.C. § 4-35-15(16).
4. On July 3, 2002, Herzog commercially, aurally applied a pesticide in North Dakota for which he refused or neglected to keep and maintain adequate records as required by N.D.C.C. § 4-35-15(7) and N.D. Admin. Code § 60-03-01-07.
5. N.D.C.C. § 4-35-23 authorizes the Commissioner to impose a civil penalty for violations of N.D.C.C. ch. 4-35, not to exceed five thousand dollars for each violation.

ANALYSIS

This case is not as complex as the hearing and the briefs might indicate. It is clear that although Herzog either claims to be or believes he was certified or somehow approved to commercially apply pesticides in North Dakota on July 3, 2002, he was not. He was licensed, certified or approved to commercially apply pesticides in Minnesota and was able to become so certified in Minnesota without too much trouble, though on at least one occasion Minnesota had reason to believe that Herzog was conducting a commercial pesticide operation without being licensed. Herzog was issued a certificate of authority as a foreign corporation by the Secretary of State in North Dakota and filed a Chemical Applicator Appointment of Agent with the Secretary of State in North Dakota, but he was never commercially certified, licensed, or

approved to apply pesticides in North Dakota in accordance with the certification requirements of N.D.C.C. ch. 4-35, and he either knew or should have known what the certification requirements were, especially because he was already a commercial applicator of pesticides in Minnesota. In Minnesota, as in North Dakota, filing with the Secretary of State as a corporation is not the same as being licensed, certified, or approved to commercially operate as a pesticide applicator.

Further, either set of records used by Herzog for the records requirements of N.D.C.C. ch. 4-35 and N.D. Admin. Code § 60-03-03-07 are deficient. The ones the Department was able to obtain in its investigation shortly after the time of the commercial aerial application by Herzog on July 3, 2002, are deficient as alleged in the Complaint. The ones Herzog submitted for the first time at the hearing are deficient as determined by the Department's Pesticide Coordinator at the hearing. Further, these later records submitted by Herzog were not completed and made available on the day of the pesticide application, July 3, 2002, or even at a reasonable time thereafter, though the Department's investigator did not specifically ask Herzog to supply his records for July 3, 2002, during the course of his investigation.

The Complaint does not specifically allege and, therefore, this decision does not find a separate violation of N.D.C.C. § 4-35-09.1, failure to furnish proof of financial responsibility. Granted, such a filing is necessary to become certified or to maintain certification, but also finding a separate violation for failure to furnish proof of financial responsibility when there is already a violation for failure to comply with the certification requirements of the pesticide laws (failure to furnish proof of financial responsibility is part of the certification requirements) is akin to finding the same violation twice. Herzog did not comply with the requirements of certification, including furnishing proof of financial responsibility. If he had complied with all of the other requirements of certification before venturing into North Dakota to apply pesticides,

the Department likely would have told him proof of financial responsibility was also required, and Herzog would have provided it. The Department never asked Herzog to provide such proof. Indeed, it was pointless to provide such proof unless the other requirements of certification were met. The evidence shows that Herzog could have provided proof and, indeed, he provided proof when he completed the requirements for certification after being informed he was not certified.

Herzog asserts "due process" violations by the Department with regard to the certification laws, and especially with regard to the Department's actions concerning its penalty matrix used for determining the appropriate amount of civil penalty for violations of the pesticide laws, but the ALJ is not able to rule on such a claims. *First Bank of Buffalo v. Conrad*, 350 N.W. 2d, 580, 584-585 (N.D. 1984). The ALJ and the Commissioner must assume the constitutionality of the certification laws. The law gives the Commissioner considerable discretion and authority in imposing civil penalties. *See* Department's Reply Brief.

A knowing violation is not required before the imposition of a civil penalty may occur. *See* Department's Post Hearing Brief at 14.

Finally, the Department is not estopped from bringing this action against Herzog. *See* Department's Post Hearing Brief at 15-17.

RECOMMENDED ORDER

The greater weight of the evidence shows that Herzog violated the provisions of N.D.C.C. § 4-35-15 and N.D. Admin. Code § 60-03-01-07 as alleged in the Complaint. The Department in its briefs recommends a \$5,000 civil penalty for the violations proven at the hearing. Herzog argues for no penalty or a minimal penalty. The Department argues three violations; the ALJ finds two. Nevertheless, the two are the most serious of the violations claimed by the Department.

The ALJ does not pretend that he fully understands the Department's penalty matrix system, but it is clear that after a hearing in which the violations of law alleged are proven, the Commissioner has discretionary authority to impose a penalty of up to \$5,000 for each violation, a total of \$10,000 for the two violations in this matter. In making a determination about the appropriate amount of civil penalty, after a hearing, the Commissioner need not take into consideration what the Department's penalty matrix might originally have projected, what it might project based on the two violations proven in this matter, or what the Department's offer of settlement was to the Respondent. However, these may be factors that the Commissioner will consider. After a hearing and argument by the parties in this matter, the ALJ does not recommend a specific amount of civil penalty. Instead, he recommends that the Commissioner impose an appropriate civil penalty for the two violations that is considerably less than the \$5,000 recommended by the Department in its post hearing briefs, and that the Respondent be required to pay only half of the imposed civil penalty, provided that he timely pay the amount he is required to pay, and provided that he does not further violate any of the pesticide laws of the State of North Dakota, N.D.C.C. ch. 4-35 or N.D. Admin. Code art. 60-03, within two years of the date of the Commissioner's final order in this matter.

Dated at Bismarck, North Dakota, this 10th day of August, 2003.

State of North Dakota
Roger Johnson
Commissioner of Agriculture

By: _____
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